IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No.

THELMA LOUISE HAINLINE,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled action on March 26, 1963, reversing the judgment of the United States District Court for the District of Kansas.

## CITATIONS TO OPINIONS BELOW

The unreported opinion of the District Court (R. 43-49) is printed in Appendix A, p. A4. The opinion of the Circuit Court of Appeals, printed in Appendix B, p. A13, is reported in 315 F 2d 153.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 26, 1963. No motion for rehearing was presented. The jurisdiction of this court is invoked under 28 U.S.C.A., Section 1254 (1).

## QUESTIONS PRESENTED

1. Whether an Air Force officer while participating in the activities of an aero club, a non-appropriated activity sponsored and controlled by the Air Force, is acting within the scope of his employment so as to impose liability on the United States under the Federal Tort Claims Act?

2. Whether under 28 U.S.C.A. 2411 (b) and 31 U.S.C.A 724 (a) the District Court had authority to award interest against the United States from the date of judgment?

## STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions involved are sections 1346 (b), 1402 (b), 2401 (b), 2411 (b); 2671 and 2674 of the Federal Tort Claims Act. These statutory provisions are printed in Appendix C, page A19.

## STATEMENT OF THE CASE

This suit was brought under the Federal Tort Claims Act, 28 U.S.C.A. 1346 (b), 2401 (b) and 2671-2680 for personal injuries sustained by plaintiff on November 23, 1959, when the pickup truck she was driving on a public road was struck by an airplane piloted by First Lieutenant Henry E. Goff. Lt. Goff, as part of his regular military duties, had

just completed Pilot School at the McConnell Air Force Bas but was not yet qualified to fly military aircraft. He was taking Ground School Training at the base and at the time of this accident was taking flight instruction as a member of the McConnell Air Force Base Aero Club (R. 29). Goff had joined the Aero Club on the previous day and such flight instruction at the time of the accident was being given pursuant to the articles and by laws of such club and Air Force Regulation No. 34-14 (R. 49) (Appendix E, p. A39).

The McConnell Air Force Base Aero Club was organized in 1957 (R. 40). Its purpose and objective as reflected in its articles and by laws (R. 49) was

> "* * * to stimulate an interest in aviation, to provide authorized personnel with an opportunity to engage in flying as a recreational activity and to encourage and develop skills in aeronautics, navigation, mechanics and related aero-sciences useful to the Air Force Mission."

On or about June 1, 1959, the accounts of the club were turned over to the central accounting office for non-appropriated funds at the McConnell Air Force Base. This office serviced five sundry funds, one of which was the aforementioned Aero Club (R. 41).

The term "sundry funds" was defined by Air Force Regulation 176-1, Appendix D herein, as follows:

> "Sundry funds and activities are established and maintained by income derived from the active membership of the activity or association for the benefit of the membership and bona-fide guests. Sundry funds and their activities do not receive dividends or grant assistance from revenue producing or welfare funds other than as provided in paragraph 11 g. Active membership is composed of limited groups of military per-

sonnel on active duty, eligible civilian employees or any combination of the two * * *".

This Aero Club was at all times under the direct control of the Air Force. It was governed by a board of Air Force officers and one civilian assigned by McConnell Air Force Base, special order number A-775 dated June 3, 1959 (R. 59). Air Force Regulation 34-14, paragraph 6, Appendix E herein, specifically states that Air Force base commanders will supervise club operations. When the club was first organized the Air Force loaned two or three planes to the club (R. 40-41). The club did well financially and was able to purchase the plane that was involved in this accident (R. 40). Title to the plane was taken in the name of SAC Aero Club, Inc. (R. 55).

In joining this Aero Club, Goff paid an initiation fee of $10.00. He paid $7.00 per hour for the privilege of piloting the Cessna 172 involved in this accident (R. 29).

Pursuant to regulation 176, Appendix D herein, Article VI of the McConnell Air Force Base Aero Clubs' Constitution contained the following provision (R. 51):

*"Liability*

"Hull insurance shall be carried on all mortgaged Aero Club aircraft for the protection of the members. *Liability protection is provided by the Government in accordance with Air Force Regulation 176-8.* * * *."

Thus on October 1, 1958, the Air Force cancelled all liability insurance covering non-appropriated activities, A.M.C. JAG Bulletin, 1 June 1959, Appendix D, page A23. It was petitioner's contention that the Air Force Regulations manifested an intention that such non-appropriated activities were "Federal agencies" within the meaning of the Federal Tort Claims Act and that Lt. Goff was acting

within the scope of his employment as a participant in activities of such federal agency. Accordingly, liability insurance for the protection of the public was not deemed necessary under the Air Force interpretation of Regulation 176-8.

The District Court found that Lt. Goff was negligent, and further found that as a member of an Aero Club he was engaged in the activities and pursuits provided for in the constitution of such club, and was acting within the scope of his employment as an employee of such club within the meaning of the Federal Tort Claims Act (R. 15). The District Court awarded damages in the amount of $12,467.46 together with interest thereon from April 25, 1962 (R. 19).

The United States appealed the ruling of the District Court and the United States Court of Appeals for the Tenth Circuit reversed the district court and entered judgment for the United States.

Petitioner seeks a writ of certiorari to review the judgment entered by the United States Circuit Court of Appeals for the Tenth Circuit reversing a prior judgment for plaintiff.

## REASONS FOR GRANTING THE WRIT

1. The United States Court of Appeals for the Tenth Circuit has decided an important question of federal law affecting the Air Force administration of its non-appropriated instrumentalities in a manner which appears to conflict with Air Force Regulations and the opinion rendered by the United States Court of Appeals for the Fourth Circuit in *United States of America v. Holcombe*, 277 F.2d 143 (1960) and this court in *Standard Oil Co. v. Johnson*, 316 U.S. 481, 62 S. Ct. 1168.

In *Standard Oil Co. v. Johnson, supra*, this court held army post exchanges, a non-appropriated activity of the army, are arms of the United States Military establishment and integral parts thereof. This court held:

> "* * * Post Exchanges operate under regulations of the Secretary of War pursuant to federal authority. These regulations and practices under them establish the relationship between the post exchange and the United States Government and together with the relevant statutory and constitutional provisions from which they derive, afford the data upon which the legal status of the post exchange may be determined.
>
> * * * *
>
> "On July 25, 1895, the Secretary of War under authority of Congressional enactments, promulgated regulations providing for the establishment of post exchanges. These regulations have since been amended from time to time and the exchange has become a regular feature of army posts. *That the establishment and control of post exchanges* have been in accordance with regulations rather than specific statutory directions *does not alter their status, for authorized War Department regulations have the force of law.*"
>
> *United States v. Eliason*, 16 Pet. 291, 10 L. Ed. 968.
>
> *Gratiot v. United States*, 4 How. 80, 11 L. Ed. 884.
>
> "The government assumes none of the financial obligations of the exchange. *But government officers, under government regulations handle and are responsible for all funds of the exchange which are obtained from the companies or detachments composing its membership* * * * From all this, we conclude that post exchanges as now operated are arms of the government deemed by it essential for the performance of governmental functions." (Emphasis supplied).
>
> *Standard Oil Co. v. Johnson, supra.*

In its opinion in this case, the United States Court of Appeals did not appear to recognize the force and effect of the Air Force regulations peculiarly applicable to non-appropriated fund activities. As demonstrated in *Standard Oil Co.* v. *Johnson*, *supra*, these regulations have the force of law and should be construed accordingly.

> "(f) The Secretary (of the Air Force) may prescribe regulations to carry out his functions, powers, and duties under this title."
>
> 10 US.C.A., Sec. 8012.

> "These regulations (Air Force regulations) have been worked out with great care and precision by the highest governmental authority under the terms of the statute * * *".
>
> * * *
>
> "These regulations *are made applicable to C.A.P. Passengers by Air Force Regulations* * * *".
>
> *United States* v. *Alexander*, 234 F.2d 861.

Thus in the case at hand, Air Force Regulation 176-8, Appendix D, p. A23, recognized that an employee of a non-appropriated fund activity was interpreted to include members and participants of such activity while they are using such property in the manner and for the purpose provided in the constitution or by laws of the activity. Air Force Regulation 176-8, footnote 6 states:

> "For the purpose of paragraph 14 of this regulation 'employees' is interpreted to include members and or authorized 'participants' or 'users' of nonappropriated fund airplanes, boats, hobby shops, etc., when they are using such property in the manner and for the purpose provided in the constitution, charter or by-laws of the activity."

In this particular case, Lt. Goff was using the club airplane in the manner and for the purpose provided in the by laws of the club's constitution.

The United States Circuit Court of Appeals for the Fourth Circuit in *United States* v. *Holcombe, supra,* held:

> "An officer's mess being an integral part of the military establishment and an agency of the Government according to the usual meaning of the word and having been held to be such in other context it is difficult to escape the conclusion that the Federal Tort Claims Act encompasses it."

The Government contended that non-appropriated instrumentalities such as the officer's mess are not federal agencies within the meaning of the Federal Tort Claims Act. It was contended that such non-appropriated instrumentalities were not supported by appropriations from the United States but were financed by its own operation. The court disposed of this contention by stating:

> "The statute 28 U.S.C.A. Section 2671 provides in part:
>
> " 'Federal agency includes the executive departments and independant establishment of the United States, and corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States.' No reason is given by the Government why looking to the terms of the act an appropriated activity of the Navy should be deemed included in one of the above categories but not a non-appropriated activity. The language of the statute making no such distinction it would appear to include both."
>
> *U.S.* v. *Holcombe, supra.*

The Solicitor General did not apply for a writ of certiorari to review this decision.

The decision concluded that the United States was liable for the negligence of an employee of a non-appropriated fund activity acting in the scope of her employment.

The United States Circuit Court of Appeals for the Tenth Circuit does not cite *U.S.* v. *Holcombe, supra,* in its opinion. The Holcombe case settles the issue as to whether a non-appropriated fund activity such as an Aero Club is a federal agency within the meaning of the Federal Tort Claims Act. Accordingly, if the Aero Club in this case is a federal agency, then 28 U.S.C.A. 2401 (b) defines employees of the government as including:

> "* * * Members of the military or naval forces and persons acting on behalf of a federal agency in an official capacity temporarily or permanently in the service of the United States whether with or without compensation."

The record will disclose that the purpose of the federal agency involved in this case was to provide flight instruction in the use and operation of aircraft. Each member of the club was acting on behalf of this federal agency when he was operating one of its airplanes.

The Tenth Circuit Court of Appeals would limit the application of the Federal Tort Claims Act to salaried employees of the non-appropriated fund activity. This limitation appears to be without support in the act itself or the decisions under the act. If this decision is permitted to stand, a non-appropriated fund activity could escape liability under the act by conducting its operation through its individual members rather than through employees hired for that purpose.

In *Paitno* v. *United States,* 311 F.2d 604 (1962), the Tenth Circuit Court of Appeals stated:

> "The fact of employment is in a different category. The States may not decide for the United States who are

and who are not Federal employees because the existence of Federal employment is a Federal question to be answered by application of Federal law."

Petitioner contends that the question of whether Lt. Goff was an employee of a federal agency is a federal question to be determined by federal law. Thus in *Pattno* v. *United States, supra*, the court found an air national guard regulation to be persuasive as to the fact of employment. The purpose and control of the flight was further examined.

Accordingly in this case the Air Force Regulation 176-8 should be persuasive as to whether Lt. Goff was an employee of the Aero Club. Further, since Goff's flight was under the control of a federal agency, that fact should establish his employment with that agency.

Petitioner has no quarrel with the Tenth Circuit Court of Appeals' statement that Kansas law controls the application of respondeat superior. *Williams* v. *United States*, 350 U.S. 857, 76 S. Ct. 100. The Tenth Circuit has applied the doctrine of respondeat superior on the supposition that the United States Air Force was the master and Lt. Goff was the servant when in actuality the Aero Club and Air Force were the joint employers and Lt. Goff was the servant of both. Since *U.S.* v. *Holcombe, supra*, there appears to be no question but that a non-appropriated fund activity (*i. e.* officer's mess) could act in the role of a master in carrying out its functions under the general supervision of the U.S. Navy. On this basis, Lt. Goff was acting in the scope of his employment in carrying out the functions of the Aero Club and the Air Force satisfying the requirements of Kansas Law on respondeat superior.

"The simple test is whether they were acts within the scope of his employment; not whether they were done

while prosecuting the master's business; but whether they were done by the servant in furtherance thereof and where such as may fairly be said to have been authorized by him.'"

*Kemp* v. *Railway Company*, 91 Kan. 477, 138 Pac. 621.

"In determining whether a person is the servant of another it is necessary that he not only be subject to the latter's control or right of control with regard to the work to be done and the manner of performing it, but that the work is to be performed on the business of the master or for his benefit. Actual control of course is not essential. *It is the right to control which is determinative.*

"Under the doctrine of *respondeat superior* a person may be the servant of two masters, not joint employers at one time as to one act, if service to one does not involve abandonment of the service to the other."

*Voss* v. *Bridwell*, 188 Kan. 643, 364 P.2d 955 (1961).

Petitioner contends that the Tenth Circuit Court of Appeals has construed the Kansas law on respondeat superior too narrowly in reaching its decision.

"The maxim applied here is a familiar one: *Qui fait per alium facit per se*. That which the superior has put the inferior in motion to do must be regarded as done by the superior himself, and his responsibility is the same as if he had done it in person * * *".

*Kansas Lumber Co.* v. *The Central Bank of Kansas*, 34 Kan. 635, 9 Pac. 751.

The court further places undue emphasis on the fact that Lt. Goff derived some personal benefit from participating in the activities of the Aero Club.

"True it was in part to accommodate the servant but the truck was taken and used in part at least for the ac-

commodation of the defendant and the promotion of his business."

*Snyder* v. *Eriksen*, 109 Kan. 315, 198 Pac. 1080.

The record in this case will not indicate that Lt. Goff was engaged in an activity for his sole benefit. It shows that he was acting under the direction and control of the Air Force and the commanding officer of the Aero Club in the furtherance of the purposes set forth in Air Force Regulation.

In summary, we have the Air Force organizing and supervising Aero Clubs, furnishing planes for their use, setting into motion hazardous instrumentalities at the risk of the public to further the training mission of the military establishment. It was not the intention of Congress in enacting the Federal Tort Claims Act that persons injured through the operation of such federal agencies would be denied recovery for their injuries and damages.

2. In the event the judgment is reinstated, the interest should be awarded from the date of judgment pursuant to 28 U.S.C.A. 2411 (b), Appendix C, p. A19.

There appears to be a conflict in the provision of 28 U.S.C.A. 2411 (b) and 31 USA 724 (a). Repeals by implication are not favored. Accordingly 28 U.S.C.A. 2411 (b) should be given consideration in determining this question. This problem is sufficiently important to the administration of the Federal Tort Claims Act that the opinion of this court should be secured on this feature.

The only case directly in point construing these provisions under the Federal Tort Claims Act is *United States* v. *Jacobs*, 308 F.2d 906. The Fifth Circuit appears to treat Sec. 2411 (b) as repealed by 31 U.S.C.A., Sec. 724a.

## CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

PAYNE H. RATNER,
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Date